

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Criminal Appeal No. 58 of 2004

With

Criminal Reference No. 3 of 2004

And

Criminal Appeal No. 56 of 2004

Date of decision: 24th August, 2004

For the approval of:

Hon'ble Chief Justice V.S. Sirpurkar.

Hon'ble Mr. Justice Irshad Hussain.

- Whether the order/judgment should be sent to the reporters for reporting? (Yes)

- Whether the reporters be allowed to see the judgment? (Yes)

G

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Crl. Appeal No. 58 of 2004

Surendra Singh @ Babloo,
S/o Shri Bhopal Singh,
R/o Landhora, Police Station Manglaur,
District Haridwar. ----- Appellant

Versus

State of Uttaranchal ----- Opposite Party

WITH

Crl. Reference No. 3 of 2004

State of Uttaranchal

Versus

Surendra Singh @ Babloo,
S/o Shri Bhopal Singh,
R/o Landhora, Police Station Manglaur,
District Haridwar. ----- Accused

&

Crl. Appeal No. 56 of 2004

Smt. Naresho,
W/o Late Shri Shiv Kumar @ Shibbu,
R/o Landhora, Police Station Manglaur,
District Haridwar. ----- Appellant

Versus

State of Uttaranchal ----- Opposite Party

.....

Mr. Rajendra Singh, learned counsel for the appellants.
Mr. D.K. Sharma, learned Government Advocate for the State.

**Coram: Hon'ble V.S. Sirpurkar, C.J.,
 Hon'ble Irshad Hussain, J.**

Date: 24th August, 2004

(Per Hon'ble the Chief Justice)

1. This Judgment shall dispose of the criminal appeal No. 58 of 2004 along with criminal reference No. 3 of 2004 and also the criminal appeal No. 56 of 2004. Criminal appeal No. 56 of 2004 has been filed by the accused Smt. Naresho against the conviction under Section 120-B I.P.C. and the resultant sentence for life imprisonment. Criminal appeal No. 58 of 2004 has been filed by the accused Surendra Singh, who is also convicted for the same offence under Section 302 I.P.C., but has been awarded death sentence. A reference is made only for confirmation of the death sentence awarded by the Sessions Judge. Needless to mention that both the accused-appellants were tried in a common sessions trial, where one Shiv Kumar alias Shibbu was said to have been murdered in the night of 23/24 February, 1993. While accused Surendra Singh, who was accused No. 1 in the trial, was charged with a substantive offence, the accused Naresho, who was accused No. 2 in the trial, was roped-in in the aid of section 120-B I.P.C. In this judgment, the accused persons shall be referred either by their names or by their original accused number during the trial.

2. The deceased Shiv Kumar alias Shibbu was the husband of original accused No. 2 Naresho and they resided with their father Molhar Singh at Village Landhora, Police Station Manglaur, District Haridwar. Deceased Shiv Kumar was in the business of selling milk. Mosoum (PW1) S/o Shauqut Ali used to go to the house of the deceased Shiv Kumar for milking the cattle and collection of milk. When he went to the house of Shiv Kumar in the morning of 24th February, 1993, he found Shiv Kumar sleeping near the cattle shed, who did not wake up on being awakened. However, Mosoum (PW1) went inside, at that time, original accused No. 2 Naresho enquired whether it was a milkman, who had come. On that, he asked for a bucket for milking the cattle. However, he found that the said room, from which the original accused No. 2 Naresho was talking to him, was locked. Naresho, then passed him the key through the window.

He opened the lock and original accused No. 2 Naresho, then, gave him the bucket. Both of them came to the cattle shed, where Shiv Kumar was sleeping. Again, Naresho tried to wake up Shiv Kumar, but he did not wake up on which, Naresho started crying. Mosoum (PW1), therefore, went to the nearby house of Niranjana Singh (PW2), who came with him there. He also tried to wake up Shiv Kumar. However, finding that Shiv Kumar was not speaking, he removed the quilt and found that he was not breathing nor was there any pulse. He, therefore, went to call the doctor. In the meantime, neighbour Krishan Pal Singh (PW3) and his wife also came there. Son of Krishan Pal Singh (PW3) came with a torch. The doctor also came and all of them found that Shiv Kumar's neck was cut. There was blood on the bed as also on the ground. This was at about 6'O Clock in the morning.

3. Niranjana Singh (PW2) got a report scribed through Ajay Kumar and gave it at the Police Station. After registering the offence, D.P. Tyagi (PW12), Incharge of the Police Station Manglaur, came on the spot along with him. He started the investigation and recorded the Panchayatnama. He seized the blood stained articles in presence of the Panchas. He then recorded the statement of witnesses. The prosecution alleges that the original accused No. 1 Surendra Singh came to Krishan Pal Singh (PW3) in the afternoon of 24th February, 1993 and confessed that he had illicit relations with original accused No. 2 Naresho, the wife of the deceased Shiv Kumar and that she was also carrying his baby and that this was suspected by the deceased Shiv Kumar, who used to beat his wife, original accused No. 2 Naresho and refuse to give her food and Naresho use to be hungry and without food when he used to beat her and could not see the sufferings of Naresho. In his further confession to Krishan Pal Singh (PW3), he had said that Naresho insisted that if Shiv Kumar is not eliminated, even the child, whom she is carrying in her womb, would die along with her. She, therefore, insisted that Shiv Kumar should be eliminated. It is the prosecution's case that in his confession, original accused No. 1 Surendra Singh also said that he had tried to

commit the murder on 18th February, 1993 too, but at that time, the sickle (*Gandasa*) was not available and on that, he was chided by original accused No. 2 Naresho that he had not kept his promise. He, further, confessed that on 23/24th February, 1993 at about 2 or 2:30 in the night, he had gone to Shiv Kumar and had asked for a *bidi* by waking him up, but Shiv Kumar said that there was no *bidi* available and therefore, he went to his own house and then, again, at about 4'O Clock, he went to Shiv Kumar's house, found that he was sleeping and hence, gave two blows with the sickle because of which, Shiv Kumar died. He, further suggested that he went to Naresho, who was sleeping inside and told her that he had murdered Shiv Kumar and asked for the lock & key. He locked Naresho inside the room and passed the key through the window to Naresho. He, then, beseeched Krishan Pal Singh (PW3) to save him.

4. Original accused No. 1 Surendra Singh came to be arrested on the basis of the statements of the witnesses, which include Kalu Ram (PW6) and Santu (PW7), who claimed that they had seen original accused No. 1 Surendra Singh coming out of the house of the deceased Shiv Kumar during that night. Molhar Singh, the father of the deceased was not present on that day. He was called from Haridwar. It is the prosecution's case that on 26th February, 1993, on his asking original accused No. 2 Naresho as to how this has happened, Naresho confessed to him that she had illicit relations with original accused No. 1 Surendra Singh and the deceased Shiv Kumar was murdered at his instance. The Investigating Officer had sent the dead body for post mortem. Post mortem was committed by the doctor. Eventually, the accused came to be arrested, who in presence of the witnesses, produced the sickle and his blood stained clothes from inside his house. The blood stained articles were also sent to the chemical analyser. Ultimately, a charge-sheet came to be filed against the accused persons and the charges were framed. Both the accused persons abjured the guilt and faced the trial.

5. During the trial, the prosecution examined as many as about 12 witnesses, out of whom, Mosoum (PW1) was the one, who had, for the first time, seen the body. Niranjan (PW2) had given the report. Krishan Pal Singh (PW3) was the chairman of the Village. He acted as a Panch also and deposed about the extra-judicial confession made to him on 24th February, 1993 by the original accused No. 1 Surendra Singh. Molhar Singh (PW4), the father of the deceased Shiv Kumar, deposed about the extra-judicial confession made to him by the original accused No. 2 Naresho. Dr. B.L. Verma (PW5) conducted the post mortem of the dead body. Kalu Ram (PW6) deposed that he had seen original accused No. 1 Surendra Singh at about 4'O Clock, when Surendra Singh was coming out of the house of Shiv Kumar and at that time, he was armed with sickle. Santu (PW7) asserted that he had seen original accused No. 1 Surendra Singh coming out of the house of the deceased Shiv Kumar at about 2'O Clock. Samay Singh (PW8) was the witness, who turned hostile. He was a witness on the recovery of the sickle. Smt. Shanti (PW9) is the one, who spoke about the relations between original accused No. 1 Surendra Singh and original accused No. 2 Naresho. PW10, PW11 and PW12 are the police witnesses.

6. On the basis of this evidence, the Sessions Judge, Haridwar, who tried the accused persons, came to the conclusion that the two accused persons had conspired together to eliminate deceased Shiv Kumar in pursuance of their illicit relationship. He also held that it was in pursuance of that illicit relationship, that original accused No. 1 Surendra Singh committed the murder. Sessions Judge, therefore, convicted the original accused No. 2 Naresho only with the offence under section 120-B for conspiring for murder and sentenced her with rigorous imprisonment for life and fine of Rs. 2,000/-, while he awarded death sentence to original accused No. 1 Surendra Singh and also imposed a fine of Rs. 2,000/-.

7. It is this verdict, which is in challenge before us.

8. Mr. Rajendra Singh, learned counsel appearing on behalf of both the accused persons in both the appeals, contends before us that this was purely a case of circumstantial evidence and the prosecution had miserably failed to bring home the guilt to the accused. The learned counsel contended that so far as the original accused No. 1 Surendra Singh is concerned, firstly, the evidence of Kalu Ram (PW6) and Santu (PW7) was wholly unreliable. They were chance witnesses and the learned Sessions Judge has erred in relying upon their evidence. Learned counsel, then contended that the evidence of Krishan Pal Singh (PW3) was liable to be rejected and the story about the extra-judicial confession was bound to be disbelieved as there was no reason for the original accused No. 1 Surendra Singh to go to him and confess. Learned counsel assails the evidence of Molhar Singh (PW4) suggesting that he was interested witness and could not be accepted as it was wholly unnatural that the original accused No. 2 Naresho would confess her guilt before him. Learned counsel, further argues that the learned Sessions Judge has erred in law in relying on such confessions. Learned counsel came very heavily on the so called recovery of the blood stained clothes and the sickle and further pointed out that the prosecution had not been able to connect these articles with the accused. He pointed out that the investigation was defective and there was absolutely no evidence regarding their being any illicit relationship between the original accused No. 1 Surendra Singh and original accused No. 2 Naresho. According to Mr. Rajendra Singh, learned counsel, the very basis of the prosecution's case was knocked off as the prosecution had not been able to prove anything regarding the illicit relationship between the two accused persons. Learned defence counsel, lastly contended that even if the original accused No. 1 Surendra Singh could be convicted for the offence charged, he could not have been ordered to be sent to the gallows since this was not, at all, a case, which could be categorised as the rarest of the rare case. In so far as the original accused No. 2 Naresho is concerned, he pointed out that there was absolutely no evidence of any conspiracy and the only evidence available against

her was the so called extra-judicial confession, which by itself, is a very vague piece of evidence. He, therefore, contended that the prosecution had not been able to establish the individual circumstances or the link of those circumstances pointing only towards the guilt of the accused persons.

9. As against this, Mr. D.K. Sharma, learned public prosecutor urged that the prosecution had completed the chain of circumstances and that established the offence against both the accused persons beyond any reasonable doubt. The public prosecutor says that the evidence of confessions was genuine and there was a clinching evidence in the evidence of the two witnesses, namely, Kalu Ram (PW6) and Santu (PW7), who had seen the original accused No. 1 Surendra Singh coming out of the house of the deceased Shiv Kumar. He further pointed out that it was, but natural for the original accused No. 2 Naresho to have confessed her guilt before her father-in-law. He also pointed out that there could be no direct evidence regarding the illicit relationship between the two accused persons, but the prosecution had been able to establish such illicit relationship providing a strong motive for the heinous act of murder committed by the original accused No. 1 Surendra Singh. He, further, pointed out that the presence of human blood was well established on the clothes taken out at the instance of original accused No. 1 Surendra Singh and that would clinch the issue as there was no reasonable explanation by the accused about the same. According to the learned public prosecutor, the evidence was sufficient enough to rope in both the accused persons. Learned public prosecutor, further, very strongly supported the death sentence and suggested that the original accused No. 1 Surendra Singh was having illicit relationship with a married woman Naresho and was, thus, a menace to the society. He had not only committed an offence, but had also mercilessly eliminated the deceased Shiv Kumar removing him from his way. Therefore, Trial Court was justified in awarding death sentence to him.

10. On this backdrop, we have to see whether any offence can be said to have been established and proved against both the accused persons and whether the Trial court was justified in awarding death sentence to the original accused No. 1 Surendra Singh.

11. There can be no doubt that Shiv Kumar died a homicidal death. Dr. B.L. Verma (PW5), who conducted the post mortem, has found as many as three injuries, all the three being incised wounds on the neck of the deceased Shiv Kumar. They were lacerated incised wounds of substantial measure. The first injury was 8.5 c.m x 4 c.m., the second injury was 8.5 c.m. x 3.5 c.m. These two injuries were on the neck because of which, Oesophagus, Carotid and Trachea were found to be cut. The third injury was on the collar bone, which was bone deep resulting in the fracture of the collar bone. Thus, it is clear that the three injuries were sufficient to cause death. The doctor had also opined that the first two injuries were possible by a blow of the sickle with its sharp edge while the third injury was possible by the handle of the said sickle. There is hardly any cross-examination. However, very strangely, the doctor has admitted that the death could be possible even at about 9'O Clock at night on 23rd February, 1993. We do not have to go into the question of homicidal death because it is apparent that the death has occurred on account of murderous blows.

12. The question, however, is whether the accused persons or anyone of them can be said to be responsible for this murderous act. For this reason, in so far as the original accused No. 1 Surendra Singh is concerned, the prosecution relies mainly on the following factors:

- i. His illicit relationship with original accused No. 2 Naresho and the so called conspiracy with Naresho for eliminating Shiv Kumar by way of a motive for murder.
- ii. His extra-judicial confession made to Krishan Pal Singh (PW3).

- iii. His being seen at 2'O Clock by Santu (PW7) and at 4'O Clock by Kalu Ram (PW6) while coming out of the house of the deceased Shiv Kumar.
- iv. The recovery of blood stained clothes and the sickle on which human blood was found.

13. In so far as the original accused No. 2 Naresho is concerned, the prosecution relies on her illicit relationship with original accused No. 1 Surendra Singh and her extra-judicial confession made to her father-in-law Molhar Singh (PW4).

14. Since, the issue of illicit relationship is common, we will concentrate on that question. In support of there being illicit relationship in between the two accused persons, apart from the extra-judicial confessions, the main witness appears to be Smt. Shanti (PW9), wife of Ram Chandra. She alleged that she knew the deceased Shiv Kumar and she used to visit original accused No. 2 Naresho from time to time and Naresho always used to wear old dirty clothes and without any vermilion mark. She had seen original accused No. 1 Surendra Singh and original accused No. 2 Naresho standing near '*Patoda*' probably the compound. In the first place, this witness admitted that she was the grandmother of the deceased Shiv Kumar. Even taking her evidence to its maximum height, it can be said that she had, at the most, seen Naresho and Surendra Singh standing near the compound. This would hardly establish any illicit relationship between the two. We, therefore, refuse to rely on the evidence of this witness. The other direct evidence made available by the prosecution is Kalu Ram (PW6). He had, in his examination-in-chief, asserted that original accused No. 1 Surendra Singh had illicit relationship with Shiv Kumar's wife Naresho. In his cross-examination, though he asserted that this illicit relationship was known to the whole village, nothing had happened in between original accused No. 1 Surendra Singh and original accused No. 2 Naresho in his presence supporting such illicit relationship. A suggestion was given to him that he being the relation of Shiv Kumar, was giving a false evidence. He also

admitted that after this incident, Naresho got married to someone else. We will come to the evidence of this witness later on. However, in so far as his assertion about the illicit relationship is concerned, beyond saying that this was known to the whole village, there is nothing to suggest such relationship. He has, in fact, admitted that nothing had happened in between the original accused No. 1 Surendra Singh and original accused No. 2 Naresho in his presence or that probably he had not seen anything between them, which go to show that the story regarding the illicit relationship is a myth. We are not prepared to believe this witness, at least in so far as the story of illicit relationship is concerned. That leaves in the fray only the so called extra-judicial confessions made by the original accused No. 1 Surendra Singh to Krishan Pal Singh (PW3) and by the original accused No. 2 Naresho to Molhar Singh (PW4), which we will independently consider. However, on the evidence of the witnesses, who, we have indicated above, there is nothing to suggest that there was any illicit relationship between the two accused persons.

15. We will, now, consider the next circumstance of the extra-judicial confessions. Krishan Pal Singh (PW3) is the chairman of the Village Landhora. Very significantly, he, in his examination-in-chief, does not said anything about any illicit relationship in between the original accused No. 1 Surendra Singh and Shiv Kumar, who was his neighbour. He was the one, who saw the dead body of Shiv Kumar. He also acted as a Panch on 24th February, 1993. In his evidence, he asserts that on the same day in the after noon i.e. on 24th February, 1993, original accused No. 1 Surendra Singh came to him and made the extra-judicial confession to him. The story given by him is full of unnatural details. Very significantly enough, though this story became available to him on 24th February, 1993 and though the police officers, including the Investigating Officer, were available in that place all through, it is not till the next day i.e. on 25th February, 1993 that his statement was recorded. If a clinching evidence like extra-judicial confession, suggesting Surendra Singh to be the perpetrator of

the crime, had become available to this person, who is in public life, it is very unnatural that the same should not have been reported to the police on the same day. He asserts in his cross-examination that he, on the same day, went to meet the police to report about the extra-judicial confession made to him by the original accused No. 1 Surendra Singh. However, since, he was not able to meet the Investigating Officer, namely, Daroga Ji, he told this to Diwan Ji and came back. He had to admit in his cross-examination that on 25th February, 1993 the S.O. (PW12) came to his house and at that time there was nobody with him and it was on the same day "उसी दिन" that the original accused No. 1 Surendra Singh had come to his house in the afternoon. In his evidence, the Investigating Officer Mr. D.P. Tyagi (PW12) has asserted that after registering the crime, he had gone to the spot and after doing the necessary investigation, he had also recorded the statements of Bhopal Singh father of the accused Surendra Singh, Ved Pal, Krishan Pal Singh, Shuman Singh, Fagan Singh, Smt. Pratima, Naresh, Ilam Chandra, Santu, Kalu Ram etc. Now if the extra-judicial confession became available on 24th February, 1993, itself, there is no reason why, firstly, Krishan Pal Singh (PW3) should have waited till 25th February, 1993 to report such an important event and why his statement should have been recorded only on 25th February, 1993 at about 10 or 10:30 A.M. This delay raises the first suspicion. In this behalf, it is liable to be seen that Mukandi Lal Sharma (PW10), who had come along with the Investigating Officer on the spot, says in his cross-examination that after the body of Shiv Kumar was sent for post mortem, the police party remained on the spot for 5 or 6 hours. He candidly admits that all of them were present at the spot up to 4 or 5 P.M. This puts us on guard against Krishan Pal Singh's (PW3) statement that the extra-judicial confession was made to him at about 2'O clock in the afternoon and that he had wanted to contact the police and had actually gone for that purpose at 4'O clock and since, he could not get the Investigating Officer, he came back only after intimating Diwan

Ji. That Diwan Ji is not examined at all for the reasons known to the prosecution.

16. After all, it is not as if the witness had any special relationship with the original accused No. 1 Surendra Singh. Therefore, there was no earthly reason why the original accused No. 1 Surendra Singh should have gone and confessed about his illicit relationship as well as the dastardly act of murder. It is suggested to this witness by the defence in his cross-examination that firstly, no such statement was given to him. What puts us on guard against this extra-judicial confession is that it is extremely lengthy covering the aspects of, firstly, the illicit relationship and the ill treatment to original accused No. 2 Naresho by the deceased Shiv Kumar, then the consequent conspiracy, the insistence on the part of Naresho to eliminate Shiv Kumar, the visit of original accused No. 1 Surendra Singh to Shiv Kumar's house at 2 or 2:30 in the night only for asking a *bidi* and lastly, the ultimate act of murder. An extra-judicial confession, much less made to a person with whom the accused had no relationship, could not be full of murky details covering all the allegations by the prosecution against the accused person. The unnatural and unusual length and details of this extra-judicial confession put us on guard against this. This is apart from the fact that the extra-judicial confession appears to be tailored to corroborate the evidence of Santu (PW7), who is alleged to have seen the original accused No. 1 Surendra Singh coming out of the house of the deceased at exactly 2 or 2:30 A.M. Now, if there was a plan to eliminate Shiv Kumar, there would be no reason for the accused to go at 2 or 2:30 A.M. to his house, wake him up and only ask for a *bidi* at that unearthly hour. That portion, where the witness claims that the original accused No. 1 Surendra Singh told him that he had gone at 2 or 2:30 A.M. to the house of the deceased Shiv Kumar and asked the *bidi* and since there was no *bidi* he came back, appears to have been introduced only to suit the evidence of Santu (PW7), who in his evidence has claimed that while he was coming from Santosh's house after the celebration

of the marriage, he saw the original accused No. 1 Surendra Singh coming out of the house of the deceased Shiv Kumar. We will appreciate the evidence of Santu (PW7) later on, but at this stage, while appreciating the evidence regarding the extra-judicial confession, this fact appears to have been deliberately introduced. What puts us, again, on guard is the last portion of the confession made, which is in order to suit the evidence of Mosoum (PW1) and further, to corroborate the fact that on that day, the room of original accused No. 2 Naresho was locked from outside. It is completely understandable as to why Naresho's room was locked from outside. There may be more reasons than one why the room of Naresho was locked from outside if Mosoum (PW1) is to be believed. However, when we find a support even to that fact, sought to be stolen from the extra-judicial confession, it would put us on guard. We do not find the said lock and key to have been seized nor have those lock and key put to witness Mosoum (PW1) for identification. Even if we presume that Naresho was locked inside the house in her room, it could be a private arrangement between the deceased Shiv Kumar and his wife because, admittedly, the deceased Shiv Kumar used to sleep separately near the cattle shed and the arrangement could have been made so as to ensure the safety of Naresho. That is relatively an insignificant fact, but when we see a support to even such an insignificant fact in the extra-judicial confession, the same becomes doubtful.

17. Lastly, there are some very significant similarities to be found in the so called extra judicial confession made by the original accused No. 1 Surendra Singh to Krishan Pal Singh (PW3) and the extra judicial confession made by the original accused No. 2 Naresho to her father-in-law Molhar Singh (PW4). Ordinarily, one confession cannot be same as other because they are made by the different persons. But, when we see a common phraseology in both the confessions, which is of slightly unusual in nature, it would put us on guard. We would immediately show the said similarities. That would also take us to the

extra judicial confession allegedly made by Naresho to her father-in-law Molhar Singh (PW4), which is practically the only basis for the conviction of original accused No. 2 Naresho for the offence of conspiracy. We shall first deal with the confession of original accused No. 2 Naresho so as to compare the similarity of some expressions therein with the alleged confession made by original accused No. 1 Surendra Singh to Krishan Pal Singh (PW3). Molhar Singh (PW4) claims that on 26.2.1993, when he was alone, he asked his daughter-in-law Naresho, when she was alone, as to what she had done in his absence, on which Naresho started crying and told him that she was mislead by original accused No. 1 Surendra Singh alias Babloo and he had said to her that she should not cry and he would marry her and that he would remove Shiv Kumar from the way. The witness, then claims that Naresho told him that Shiv Kumar used to beat her and used to say that she would have nothing to do with the house and she would not eat from this house or wear any clothes from this house (*Na to tu si ghar ka khana khaygi na hi kapda pehnegi*). He then claims that Naresho told him that she said to original accused No. 1 Surendra Singh that he should remove Shiv Kumar or she would eat poison (*Shiv Kumar ko hata do ya main jahar kha lungi*). The witness further asserts that Naresho had said to original accused No. 1 Surendra Singh that “the day you remove Shiv Kumar from the way, I will marry you, the child in my womb is yours” (*jis din tu Shiv Kumar ko raste se hata dega main tera naam ka sindur bhar lungi. Ye bhi tera mere pet ka baccha bhi tera hai*).

18. We shall consider the evidence of Molhar Singh (PW4) a little later, but what strikes us is the similarity of certain expressions in the two extra-judicial confessions. Even, the original accused No. 1 Surendra Singh is said to have said and told to Krishan Pal Singh (PW3) that Shiv Kumar used to beat Naresho and used to say “you will neither eat from this house nor drink” (*Shiv Kumar Naresho ko marta peetta tha wa kehta tha ki tu is ghar ka na khaygi na piyegi*). Again, this expression in Hindi with a little difference is to be found

in Naresho's extra-judicial confession also. Krishan Pal Singh (PW3) had also stated that Naresho had said to Surendra Singh that he should do something otherwise she will eat poison (*yadi intzaam na kiya to jahar khakar mar jayegi*). Even, this reference to taking poison is to be found in the same terms in the extra-judicial confession of Naresho. Last very significant similarity is to be found in this extra-judicial confession is to the following effect that "I will adorn myself with vermillion mark" (*mang mai sindur bhi bharungi to tere ghar mai hi aakar bharungi*).

19. The similarity of the expressions, which we have shown above in the two extra-judicial confessions, also put us on guard. In both the confessions, there is an expression that Naresho will not eat in this house nor wear any clothes. Secondly, there is a clear reference that Shiv Kumar should be removed from the way or she will eat poison (*jahar kha lungi*) and then, the last very significant similarity is regarding adorning herself with vermilion mark (*tere naam ka sindur bhar lungi*). These unusual expressions and the unusual similarities to be found in the two extra-judicial confessions also make the said extra-judicial confession, allegedly made by original accused No.1 Surendra Singh to Krishan Pal Singh (PW3), a seriously suspicious affair. At the same time, we must also say that the claim of Molhar Singh (PW4) that original accused No. 2 Naresho had made the extra-judicial confession to him, also appears to be extremely suspicious. Molhar Singh (PW4) was called on 24.2.1993. Nothing had happened on 25.2.1993. There was no reason for the original accused No. 2 Naresho to have confessed in the manner that she did. The witness was candid enough to admit that he had no suspicion against the original accused No. 1 Surendra Singh. He was also candid enough to admit that in his presence original accused No. 1 Surendra Singh and original accused No. 2 Naresho had never talked to each other. Under these circumstances, the claim of the witness, who was the father-in-law of the original accused No. 2 Naresho that his daughter-in-law confessed about her illicit intimacy, about her carrying a child of

original accused No. 1 Surendra Singh and about her praying to Surendra Singh to remove Shiv Kumar from the scene, appears to be absolutely improbable. We can test this fact of extra-judicial confession also on the basis of the fact that this witness never said that the relationship of original accused No. 2 Naresho with Shiv Kumar was strained in any manner. Considering that he was living in the same house along with his son Shiv Kumar and daughter-in-law Naresho, it is impossible that he would not note the strained relationship between the two or the alleged ill-treatment given by Shiv Kumar to Naresho, which was the reasonatory for the so called conspiracy to eliminate Shiv Kumar. Very significantly, we have nothing from this witness on the so called strained relationship. Under such circumstances, we deem it extremely improbable that original accused No. 2 Naresho would unabashedly admit of her illicit relationship or her being treated cruelly by Shiv Kumar and as a result, her praying original accused No. 1 Surendra Singh to eliminate him. The whole evidence of this witness appears extremely unnatural. We are, therefore, of the clear opinion that the claim of extra-judicial confession made by original accused No. 2 Naresho to this witness is a myth. After all, the witness had lost his son and it is not unnatural that he would weave a story out of a sense of retribution. We, therefore, reject this circumstance of the extra-judicial confession vis-à-vis Naresho and we would also reject the claim of Krishan Pal Singh (PW3) regarding the extra-judicial confession made to him by original accused No. 1 Surendra Singh.

20. The view that we have taken regarding the extra-judicial confession finds support in a reported decision in the case of Thangavelu Vs State of Tamil Nadu reported in 2002 Supreme Court Cases (Cri) 1382. We have already shown that the extra-judicial confession made by original accused No. 1 Surendra Singh was with the graphic details and unusually lengthy though oral. In the similar circumstances, the Supreme Court had rejected an extra-judicial confession on the ground that it was too detailed and lengthy and

sounded to be an attempt of the prosecution to build a case against the appellant. The Supreme Court had rejected the confession in this case on the ground that there was unimaginable similarity in the extra-judicial confession, the First Information Report and the evidence of this scribe of the First Information Report. The situation is no different in the present case. We have already shown that the extra-Judicial confession of original accused No. 1 Surendra Singh is almost tailored to suit the evidence of Kalu Ram (PW6) and Santu (PW7).

21. The learned public prosecutor, however, relied on a reported decision in the case of State of Rajasthan Vs Raja Ram reported in 2003 Supreme Court Cases (Cri) 1965. It is true that as per the law laid down by the Supreme Court in this case, an extra-judicial confession need not always have the corroboration and could be relied upon provided it is proved to be voluntary. However, in the same case, a caution is given by the Supreme Court in the following words:

“The law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false, does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of a confession, the court may refuse to act upon the confession even if it is admissible in evidence.”

22. Bearing this in mind, we are convinced that firstly, the extra-judicial confession made by original accused No. 1 Surendra Singh and secondly, the alleged extra-judicial confession made by original accused No. 2 Naresho, could not be said to be either voluntary or truthful.

23. That takes us on another circumstance of the evidence of Santu (PW7) and Kalu Ram (PW6). We shall, first, consider the evidence of Kalu Ram (PW6). He claims that he had seen original accused No. 1 Surendra Singh coming out of the house of Shiv Kumar and at that time, he had a sickle in his hand. He claims that, at that time, he was coming from the marriage celebration of Santosh. It is to be seen that

the investigation is completely silent as to whether, on that day, there was any marriage celebration at the said Santosh's house. There is nothing in the evidence to that effect. This is apart from the fact that admittedly he did not tell Krishan Pal Singh (PW3) in the morning, who was present on the spot of occurrence that he had seen original accused No. 1 Surendra Singh at night with sickle. This person appears to be a cousin of the deceased Shiv Kumar. Very significantly, he admits that he was with the dead body and had accompanied the same in the truck. He also admits that he came back at 9'O Clock on 24.2.1993 after the post-mortem. Yet he admits that right till then, he had no talk with the Investigating Officer. He also admits, thereafter, that he never met anybody from the police or even the Investigating Officer. According to the Investigating Officer, his statement was taken on 24.2.1993, itself. On this backdrop, the claim of this witness that he had not given the statement on 24.2.1993 or that he had not talked to the Investigating Officer on 24.2.1993, makes his evidence extremely suspicious. Ordinarily, if he was present in the morning near the dead body where even Krishan Pal Singh (PW3) was present, he would have come out with the story that he had seen the accused at night with a sickle. We, therefore, do not believe this witness at all.

24. That leaves the evidence of Santu (PW7), who claims that at about 2'O Clock in the night, while he was coming from the house of Santosh, where marriage was being celebrated, he saw original accused No. 1 Surendra Singh alias Babloo coming out of the house of deceased Shiv Kumar and entering his own house. He had to admit that he had not stated that he was coming from the house of Santosh, where the marriage was being celebrated. The witness had to admit that this incident was not told by him either to Krishan Pal Singh (PW3), to Niranjana Singh (PW2) or to Molhar Singh (PW4). Even he is a relative of Molhar Singh (PW4). We have already shown that the original accused No. 1 Surendra Singh had gone to the house of the deceased Shiv Kumar at 2'O Clock only for asking *bidi* appears to be

too far fetched. He was a mere chance witness as was Kalu Ram (PW6). If their stories were to be believed, it would have to be held that they accidentally saw original accused No. 1 Surendra Singh coming out of the house of the deceased Shiv Kumar. Therefore, both of them become the chance witnesses and that is the reason why we feel unsafe to accept their testimony.

25. That leaves us with the last, but very weighty circumstance of the recovery of blood stained clothes and the sickle, on which the human blood was allegedly found. In this behalf, it is suggested by the prosecution that after his arrest original accused No. 2 Surendra Singh agreed to discover the blood stained clothes and the weapon. Samay Singh (PW8) was examined on this question. He completely turned hostile and did not support the theory that in his presence, the accused agreed to discover the said articles. Very strangely, the Sessions Judge has, in a most slipshod manner, accepted this fact. We are not prepared to believe this theory that the original accused No. 1 Surendra Singh discovered the said blood stained clothes and the weapon. It cannot be forgotten that there was no discovery memorandum prepared. S.I. Bhaiyya Lal (PW11) deposed that in presence of the two witnesses, the accused walked ahead and took out a sickle, a one pant and one shirt, which were his own apparel. Very strangely, though the seizure Panchnama was executed, there is no Panchnama of that spot. Therefore, beyond the sketchy evidence of Bhaiyya Lal (PW11), we cannot accept the case that the place, from where the said articles were recovered, was in the exclusive user or possession of the original accused No. 1 Surendra Singh. It has nowhere come as to how many persons were residing in that house and whether the clothes were that of original accused No. 1 Surendra Singh, himself. No investigation is made to connect the said clothes or the said sickle with the original accused No. 1 Surendra Singh by proving that the clothes were exclusively being used by the accused. A very strange thing has happened that at the time of his arrest, it is not established also as to whether the accused, himself, had any injury

or not. A careless kind of investigation was done. Mukandi Lal Sharma (PW10), a Sub-Inspector also supported this theory. A very significant circumstance was brought into the cross-examination of this witness that he never tried to examine the *Kuthla* (from where the clothes were allegedly taken out). He had also not bothered to even take the measurements of the room and candidly admitted that he could not tell as to how many rooms were there in the house of original accused No. 1 Surendra Singh. There is no entry also in the Station House Dairy, which was bound to be made if original accused No. 1 Surendra Singh was taken from the police station on 27th February, 1993 to his house for recovering the articles. In short, there is no definite evidence that the recovery of these articles was made at the instance of original accused No. 1 Surendra Singh or that it was from his house that the clothes and the sickle were recovered. As if all this is not sufficient, this so called very weighty fact that human blood was found on these articles has not, at all, been put to the original accused No. 1 Surendra Singh or even to original accused No. 2 Naresho in their cross-examination. In fact, Ext. 18, the report of the chemical analyser, has not, at all, been confronted to any of the accused persons. So also the article numbers, mentioned in the chemical analyser's report, were not connected with the articles given during the trial. For example, it has come in the evidence that the Pant of the accused and his shirt were Ext. 10 & 11. These do not correlate with the chemical analyser's report and therefore, not putting the chemical analyser's report to the accused persons and seeking their explanation there for and more particularly, the explanation of original accused No. 1 Surendra Singh, becomes fatal. The blood groups of the deceased or the accused have also not been ascertained and that is one more reason why we would be slow to act on this circumstance.

26. The similar view was taken by the Supreme Court in a reported decision in the case of *Kansa Behera Vs State of Orissa* reported in 1987 Supreme Court cases (Cri) 601, where the Supreme Court

refused to accept the evidence of the blood stained clothes on the ground that the group of the blood of the deceased was not fixed. A very significant observation is made in paragraph 12, which is as under:

“Few small blood stains on the clothes of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages.”

27. We, therefore, find that this so called recovery from the house of the original accused No. 1 Surendra Singh becomes extremely suspicious in the absence of a discovery memorandum or in the absence of a proper Panchnama and the examination of the premises of the accused from where the recoveries were made. We are, therefore, not prepared to accept this witness at all.

28. As regards the faulty investigation on which we have already commented, the learned public prosecutor tried to rely on a reported decision in the case of State of U.P. Vs Jagdeo & others reported in 2003 Supreme Court Cases (Cri) 351, where the Supreme Court has refused to give benefit to the accused of a faulty investigation. In the present case, however, we find that the investigation was so slipshod that it casts doubt on all the aspects of the prosecution. The factual position in that case being entirely different, we hold that this case would be of no help to the public prosecutor. Some support was tried to be taken from the observations made in a reported decision in the case of Amar Singh Vs Balwinder Singh & others reported in 2003 Supreme Court Cases (Cri) 641 more particularly from paragraph 15 thereof that the non-mention of the witnesses in the DDR is not, by itself, fatal. In our view, the observations do not apply to the facts in the present case because, in the present case, the police officers were bound to make the entries in the General Diary, if they moved along with the accused for affecting the recovery. The absence of such entry makes the matter worse for the prosecution. In short, even in respect of the last circumstance, the prosecution has not been able to establish the same in a clinching manner. If this is the story, then it

cannot be said that any offence is proved against the original accused No. 1 Surendra Singh. In so far as the original accused No. 2 Naresho is concerned, we have discussed the so called extra-judicial confession given by her and rejected that story. If that circumstance is held not to be established, there would be nothing against her so as to have any connection with the crime.

29. There is no doubt that this was a dastardly murder and that the theory of illicit relationship between the original accused No. 1 Surendra Singh and original accused No. 2 Naresho has raised a high suspicion. However, that suspicion, by itself, in the absence of any evidence for the illicit intimacy, cannot take the place of proof. Seeing the impugned judgment of the Trial Court, we find that the Sessions Judge has accepted the theory of illicit intimacy in a most slipshod manner. Very strangely, he has relied on the proximity of the houses of the accused persons. A completely wrong statement of fact has been mentioned that Molhar Singh (PW4) had corroborated this theory. Without even discussing the evidence of Smt. Shanti (PW9), Sessions Judge seems to have relied upon her evidence. The whole approach has been sketchy and before giving handing out to such finding of illicit intimacy, the Court should have been circumspect. The same is the case with the theory of extra-judicial confessions. There is not even a semblance of discussion on the same. We strongly disapprove of such casual approach while recording the finding of fact. The Sessions Judge has brought from nowhere that the deceased Shiv Kumar and original accused No. 2 Naresho were sleeping together in the relevant night and when, during that night, Shiv Kumar was murdered, she did not cry out. The Sessions Judge has gone to the absurd finding that this indicated her “guilty conscious” (the word should have been “conscience”). There is nothing on the record to suggest this and there is no rule that the husband and wife should always sleep together. Same is the story about the extra-judicial confessions, which have been dealt with in a very casual manner. Such cannot be the approach. The evidence of Krishan Pal Singh

(PW3) and Molhar Singh (PW4) seems to have been accepted for the asking. In short, the judgment is written in a very casual manner. We strongly disapprove of the same. As if this is not sufficient, the Sessions Judge has awarded the death sentence merely by quoting some Supreme Court judgments without showing their similarity with the case in hand. Since, we are acquitting the accused persons, we do not propose to go into that question further except saying that the Sessions Judge should have been more careful in his approach.

30. In the result, the criminal appeals No. 58 of 2004 and 56 of 2004 are allowed. Original accused No. 1 Surendra Singh @ Babloo and original accused No. 2 Naresho are acquitted. Their sentences are set aside. Original accused No. 2 Naresho is on bail. Her bail bond is cancelled and sureties are discharged. She need not surrender. Fine, if already paid, shall be refunded to them.

31. Criminal Reference no. 3 of 2004 is answered against the State in view of the acquittal of the accused Surendra Singh.

(Irshad Hussain, J.)

(V.S. Sirpurkar, C.J.)

G